Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

DZXP, KRQD and QJJS and Innovation and Science Australia [2017] AATA 576 (19 April 2017)

Division: GENERAL DIVISION

File Numbers: **2015/1257, 2015/1258 and 2015/1259**

Re: **DZXP, KRQD and QJJS**

APPLICANT

And **Innovation and Science Australia**

RESPONDENT

DECISION

Tribunal: **Senior Member CR Walsh**

Date: **19 April 2017**

Place: **Perth**

The Tribunal dismisses applications 2015/1257, 2015/1258 and 2015/1259 pursuant to s 42B of the *Administrative Appeals Tribunal Act 1975.*

.....[Sgd].....

Senior Member CR Walsh

CATCHWORDS

PRACTICE & PROCEDURE – dismissal application – applications frivolous, vexatious, misconceived or lacking in substance or have no reasonable prospects of success – applications for R&D tax incentive advance/overseas findings made by wholly-owned subsidiary members of MEC groups rather than by head entities of the MEC groups - registrations and findings not effective for subsidiary members for MEC group R&D activities – application of the "single entity rule" for consolidated tax groups considered – R&D tax incentive scheme for claimed overseas R&D activities considered – powers of the Board to do all things necessary and convenient to be done for or in connection with the performance of its functions - applications dismissed

LEGISLATION

Acts Interpretation Act 1901 – s 25C

Administrative Appeals Tribunal Act 1975 – s 2A – s 42B – s 42C - s 42D – s 45

Casino Control Act 1988 (ACT)

Industry Research and Development Act 1986 – s 4(1) – s 8 – s 27A – s 28A – s 28B – s 28C – s 28D – s 28G – s 30 – s 30A – s 30C(1) – s 30D(3) – s 31 – s 31(2) – s 31A – s 31B – Div 6 of Pt III

Income Tax Assessment Act 1997 – s 355-205 – s 355-210 – s 355-210(1)(d) – Div 701 - Pt 3-90 – s 701-1 – s 701-5 – s 701-40 - s 703-5 – s 719-5 - s 995-1

Tax Laws Amendment (Research and Development) Bill 2010

Tax Laws Amendment (Research and Development) Act 2011

Tribunals Amalgamation Act 2015

Tribunals Amendment Bill 2014

CASES

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor (1991) 173 CLR 231

Duncan v Fayle (2004) 138 FCR 510

Irving and Repatriation Commission (1997) 46 ALD 20

Munnings v Australian Government Solicitor [No 2] (1994) 118 ALR 385; 68 ALJR 169

Paraponiaris and Secretary, Department of Employment [2015] AATA 895

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW) (1978) 1 ALD 167

Re Canberra Raiders Sports Club and Commissioner of ACT Revenue (1999) 59 ALD 229

Re Christ Church Circle Oriona Community Inc and Deputy Commissioner of Taxation (1995) 31 ATR 1001; 95 ATC 2040; [1995] Admin Review 48

Re Currey and Australian Community Pharmacy Authority [2007] AATA 1963; (2007) 99 ALD 106

Re Filsell and Comcare [2009] AATA 90; (2009) 109 ALD 198

Re Hare and Commissioner for Superannuation (1979) 2 ALD 233

Re Hinds and Australian National University [2012] AATA 495; (2012) 129 ALD 476

Re Marnotta Pty Ltd and Secretary, Department of Health and Ageing (2004) 82 ALD 514

Re Williams and Australian Electoral Commission (1995) 38 ALD 366

Theo v Secretary, Department of Family and Community Services (2006) 32 AAR 503; [2006] FCA 279

Victims Compensation Fund v Brown [2003] HCA 54; (2003) 77 ALJR 1797

SECONDARY MATERIALS

Explanatory Statement to the Industry Research and Development Principles 2011 – para 1.51

Explanatory Memorandum to the Tribunals Amalgamation Bill 2014 – para 552

Explanatory Memorandum to the Tax Laws Amendment (Research and Development) Bill 2010 – para 3.25 – para 3.190 – para 3.191- para 3.192 – para 3.913 – para 3.194 – para 5.159 – para 5.160 – para 5.161 – para 5.162 – para 5.163

Industry Research and Development Decision-Making Principles 2011 – cl 4.2 – cl 4.2(1)(d)

Rules of the Supreme Court of Victoria – r 36.01

REASONS FOR DECISION

Senior Member CR Walsh

19 April 2017

INTRODUCTION

1. Innovation and Science Australia (**Innovation Australia**) seeks to have applications 2015/1257, 2015/1258 and 2015/1259, brought by DZXP, KRQD and QJJS, respectively, dismissed by the Tribunal pursuant to s 42B of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**).

2. In short, Innovation Australia's position is that, by virtue of the operation of s 31 of the *Industry Research and Development Act 1986* (**IR&D Act**), the outcome of any review by the Tribunal will be of "no effect" for DZXP, KRQD and QJJS, in terms of obtaining the benefit of the R&D Tax incentive under s 355-205 and s 355-210 of the *Income Tax Assessment Act 1997* (**ITAA 1997**) for their claimed overseas R&D activities. Accordingly, Innovation Australia contends that the proceedings are "frivolous, vexatious, misconceived or lacking in substance" or, alternatively, have "no reasonable prospect of success" and should be dismissed pursuant to s 42B of the AAT Act.

3. Innovation Australia contends this on the basis that the "head entities" of the "multiple entry consolidated" groups (**MEC groups**) of which DZXP, KRQD and QJJS are wholly-owned subsidiary members, should have applied to Innovation Australia for R&D tax incentive advance/overseas findings in respect of certain overseas R&D activities, pursuant to s 28A and s 28C of the IR&D Act, instead of DZXP, KRQD and QJJS. That is, DZXP, KRQD and QJJS were the incorrect applicants for the advance/overseas findings sought.

4. DZXP, KRQD and QJJS oppose Innovation Australia's dismissal application and dispute its construction of s 31 of the IR&D Act.

5. In a document titled "Applicant's Response to the Respondent's Written Submissions Dated 24 December 2015", dated 17 February 2016 (**Applicants' Submissions**), DZXP, KRQD and QJJS state:

> *5. The Tribunal should reject the Respondent's application for dismissal of these proceedings pursuant to section 42B of the AAT Act for the following reasons which are addressed in detail in paragraphs 7 to 67 below:*
>
> *5.1. Section 31 of the IR&D Act does not operate to render ineffective the Findings; and*
>
> *5.2. The Applicants' case before the Tribunal is neither frivolous, vexatious, misconceived, lacking in substance or without reasonable prospects of success.*

FACTUAL & PROCEDURAL BACKGROUND

6. In June 2012, DZXP, KRQD and QJJS entered into an unincorporated joint venture agreement (**Joint Venture**) to recover gas in Western Australia (**Facility**).

7. Broadly, the substantive applications concern the entitlement of DZXP, KRQD and QJJS to certain research and development tax incentives relating to the Facility, which is being designed, constructed and developed by DZXP, KRQD and QJJS as participants in the Joint Venture. DZXP is the Joint Venture operator.

8. At all relevant times:

- DZXP was a wholly-owned subsidiary of DZXP M and member of a MEC group under the consolidation regime in Part 3-90 of the ITAA 1997, of which DZXP M was the "head entity" (**DZXP MEC group**);

- KRQD was a wholly-owned subsidiary of KRQD M and member of a MEC group under the consolidation regime in Part 3-90 of the ITAA 1997, of which KRQD M was the "head entity" (**KRQD MEC group**); and

- QJJS was a wholly-owned subsidiary of QJJS M and member of a MEC group under the consolidation regime in Part 3-90 of the ITAA 1997, of which QJJS M was the "head entity" (**QJJS MEC group**).

9. The "head entity" of DZXP MEC group (i.e. DZXP M) registered under s 27A of the IR&D Act as a "R&D entity" in respect of the income year ended 30 June 2013, but is not registered under s 27A of the IR&D Act in respect of the income years ended 30 June 2014 and 30 June 2015. DZXP M has lodged applications for late registration as an "R&D entity" for the 2014 and 2015 income years which, the Tribunal understands, Innovation Australia will consider under the IR&D Act and the *Industry Research and Development Decision-Making Principles 2011* (**IR&D Principles**).

10. The "head entities" of the KRQD MEC group and the QJJS MEC group (i.e. KRQD M and QJJS M, respectively) registered as "R&D entities" under s 27A of the IR&D Act for the income years ended 30 June 2013, 30 June 2014 and 30 June 2015.

11. On 20 December 2012, DZXP, KRQD and QJJS each lodged a "R&D Tax incentive Application: Advance/Overseas Finding (Section 28A and 28C, *Industry Research and Development Act 1986*)" form with AusIndustry (i.e. Innovation Australia) in relation to

expenditure on certain overseas activities conducted in connection with the Joint Venture in respect of the income years ended 30 June 2012, 30 June 2013 and 30 June 2014.

12. The claimed overseas expenditure in the applications was:

- $112,013,068 for DZXP;
- $24,985,913 for KRQD; and
- $14,277,665 for QJJS.

13. On 23 October 2014, Innovation Australia issued its findings in respect of KRQD and QJJS (T1, pg 42; T1, pg 9). The findings provide:

> ***Summary of findings and reasons:***
>
> *Findings are made on 30 overseas activities as listed in the table above. Seven of these overseas activities are found to be core R&D activities and two are found to be supporting R&D activities. The remaining activities are found to be neither core nor supporting R&D activities. However,* ***no activities satisfy the conditions under s 28D of the Industry Research and Development Act 1986 because none of the overseas activities has a significant scientific link, as defined by subsection 4(1) of the Industry Research and Development Act 1986, to a core R&D activity conducted within Australia or its external Territories****. Inter alia the company has not demonstrated that activities broadly described as 'commissioning' are core R&D activities with a significant scientific link to overseas core or supporting R&D activities.*
>
> (emphasis added)

14. On 23 October 2014, Innovation Australia issued its findings in respect of DZXP (T1, pg 80). The findings provide:

> ***Summary of findings and reasons:***
>
> *Findings are made on 40 overseas activities as listed in the table above. Nine of these overseas activities are found to be core R&D activities and four are found to be supporting R&D activities. The remaining activities are found to be neither core nor supporting R&D activities. However,* ***no activities satisfy the conditions under s 28D of the Industry Research and Development Act 1986 because none of the overseas activities has a significant scientific link, as defined by subsection 4(1) of the Industry Research and Development Act 1986, to a core R&D activity conducted within Australia or its external Territories****. Inter alia the company has not demonstrated that not for finding activities broadly described as 'commissioning' are core R&D activities with a significant scientific link to overseas core or supporting R&D activities.*
>
> (emphasis added)

15. By letters dated 19 November 2014, DZXP, KRQD and QJJS each applied to Innovation Australia for internal review of the findings issued by Innovation Australia to KRQD and QJJS on 20 October 2014 and to DZXP on 21 October 2014, respectively (**Original Findings**), pursuant to s 30C(1) of the IR&D Act. Internal review was sought by DZXP, KRQD and QJJS on the following grounds (T82, pp 3151-3155):

> *The company believes the decision made by the Board [i.e. Innovation Australia] did not accurately consider all information provided, and requests an internal review of the decision. We will provide a full summary of our concerns with the finding, and detailed grounds for objection, but first require a copy of the full and final decision report to allow us to consider the decision in total.*

16. Innovation Australia did not confirm, vary or set aside the Original Findings by the end of the 90 day statutory timeframe for internal review (which began on 20 November 2014 and ended on 17 February 2015). As a result, Innovation Australia was deemed, pursuant to s 30D(3) of the IR&D Act (T2, pg 114), to have made decisions confirming the Original Findings (**Deemed Decisions**).

17. On 16 March 2015, DZXP, KRQD and QJJS applied to the Tribunal for a review of the Deemed Decisions (being applications 2015/1257, 2015/1258 and 2015/1259, respectively). The three related applications were subsequently joined and were to be heard together.

18. On 25 September 2015, Innovation Australia wrote to the Tribunal seeking to have the matters referred with the agreement of the President of the Tribunal under s 45 of the AAT Act to the Federal Court on a question of law (i.e. a discrete question of statutory construction). By letter dated 2 October 2015, DZXP, KRQD and QJJS opposed this request.

19. Following a teleconference with the President of the Tribunal, Kerr J, on 13 November 2015, the President wrote to the parties notifying them of his decision on this issue, as follows:

> *…on reflection I have concluded that it would be inappropriate for me to express any settled view on that question at the present time.*
>
> *Section 45(1) of the Administrative Appeals Tribunal Act permits the Tribunal, with the agreement of the President, to refer a question of law arising in a proceeding before the Tribunal to the Federal Court of Australia for decision.*

> *The provision does not permit the President to invoke that power independently. While a reference of a question of law requires the agreement of the President any such reference can only be made by the Tribunal as constituted. It is therefore incumbent on a party wishing to take advantage of that facility to first persuade the Tribunal as constituted that that course would be appropriate.*
>
> *For that reason I will proceed without delay under the Tribunal's significant matters protocol to constitute the Tribunal in a manner consistent with the nature of the matters that it will be required to determine in the above reviews. Once I have so constituted the Tribunal any relevant applications can be pursued before it.*

20. On 2 December 2015, DR Johnson notified the parties that the hearing of the substantive applications had been constituted before by DP Siopis J and SM Walsh.

21. On 24 December 2015, Innovation Australia applied to have the applications dismissed pursuant to s 42B of the AAT Act. SM Walsh issued directions for the filing of submissions on this dismissal application and the matters were listed for an interlocutory hearing (s 42B dismissal application) before SM Walsh on 11 March 2016.

22. On 9 February 2016, the parties notified the Tribunal that they had commenced settlement discussions. Consequently, the interlocutory hearing, listed before SM Walsh on 11 March 2016, was vacated.

23. A number of directions hearings before SM Walsh ensued.

24. On 8 March 2016, Innovation Australia wrote to the Tribunal stating that the parties had reached an "in-principle" settlement agreement and that they would undertake to update the Tribunal on the progress of that agreement by 15 April 2016.

25. On 8 March 2016, SM Walsh directed the parties to file a settlement agreement in accordance with s 42C of the AAT Act on or before 15 April 2016 or, alternatively, for the parties to advise the Tribunal of their settlement progress by that date.

26. On 20 April 2016, 13 May 2016, 30 June 2016 and 30 August 2016, directions were made, at the request of and by consent of the parties, granting the parties an extension of time in which to file a s 42C agreement in respect of the applications. In the directions made on 30 August 2016, SM Walsh notified the parties if they failed to comply with Direction 2 (i.e. they failed to file a s 42C agreement by 31 October 2016), the matters would be listed for a directions hearing to discuss settlement progress.

27. On 15 November 2016, the parties notified the Tribunal that settlement negotiations had broken down and they would no longer be able to settle the proceedings.

28. In a directions hearing before SM Walsh on 16 November 2016, the parties confirmed that they had been unable to settle and that Innovation Australia wished to re-enliven its s 42B dismissal application (of 24 December 2015).

29. The dismissal application was ultimately heard by SM Walsh on 15 March 2017.

CONSIDERATION

Section 42B of the AAT Act

30. Section 42B of the AAT Act was amended pursuant to the *Tribunals Amalgamation Act 2015*, with effect from 1 July 2015. Section 42B of the AAT Act, as amended, provides:

> ***Power of Tribunal if a proceeding is frivolous, vexatious etc***
>
> *(1) The Tribunal may dismiss an application for review of a decision, at any stage of the proceeding, if the Tribunal is satisfied that the application:*
>
> *(a) is frivolous, vexatious, misconceived or lacking in substance; or*
>
> *(b) has no reasonable prospect of success; or*
>
> *(c) is otherwise an abuse of the process of the Tribunal.*
>
> *(2) If the Tribunal dismisses an application under subsection (1), it may, on application by a party to the proceeding, give a written direction that the person who made the application must not, without leave of the Tribunal, make a subsequent application to the Tribunal of a kind or kinds specified in the direction.*
>
> *(3) The direction has effect despite any other provision of this Act or any other Act.*

31. Previously, the power to dismiss was limited to an application that the Tribunal was satisfied was frivolous or vexatious. The Explanatory Memorandum to the *Tribunals Amalgamation Bill 2014* described the amendments as intended to modernise the language of the section and to clarify the policy surrounding the grounds for dismissal. The proposed new grounds were considered to be similar to dismissal powers available to other bodies, and:

> *552. …would provide the Tribunal with greater power to dismiss unmeritorious matters early where appropriate.*

32. That said, the principles developed in relation to the early formulation of s 42B are of continuing relevance.

33. The Tribunal has made it clear that the dismissal power in s 42B is to be used cautiously and sparingly. That is, if a legitimate purpose could be achieved by allowing the application to continue, it should not be prevented: *Re Marnotta Pty Ltd and Secretary, Department of Health and Ageing* (2004) 82 ALD 514; *Re Hinds and Australian National University* [2012] AATA 495; (2012) 129 ALD 476. However, if the application can serve no purpose for the applicant, it should not continue to use Tribunal time and resources: *Re Williams and Australian Electoral Commission* (1995) 38 ALD 366 (***Williams***); *Re Currey and Australian Community Pharmacy Authority* [2007] AATA 1963; (2007) 99 ALD 106 (***Currey***).

34. One of the most frequently cited discussions on the approach that should be taken to s 42B applications is that contained in *Williams*, wherein the Tribunal stated that the genuineness of the applicant's belief may be relevant, perhaps decisive, where the subject matter of that belief is *factual* rather than *legal* in nature. But where the issue in dispute relates to the *legal* consequences of an application, the genuineness of the applicant's belief as to the legitimacy of the application must yield to a conclusion that, as a matter of law, no legitimate purpose can be achieved by continuing with the proceeding: see also *Re Christ Church Circle Oriona Community Inc and Deputy Commissioner of Taxation* (1995) 31 ATR 1001; 95 ATC 2040; [1995] Admin Review 48.

35. In *Re Filsell and Comcare* [2009] AATA 90; (2009) 109 ALD 198 (***Re Filsell***), DP Jarvis sets out the principles that should be followed in regard to s 42B applications under former s 42B. DP Jarvis comments (at [33]):

> *(a) The word "frivolous" in combination with "vexatious" is a technical legal term, which means that there is no legal basis for the proceedings; it does not necessarily connote that an applicant has acted frivolously in bringing proceedings: Pitt v OneSteel Reinforcing Pty Ltd [2008] FCA 923 at [9].*
>
> *(b) The expression "vexatious" can include proceedings brought with the intention of annoying or embarrassing or harassing the other party, or for some collateral purpose other than having the court or tribunal adjudicate on the issues raised by the proceedings, or, irrespective of the motive of the litigant, if the proceedings are "so obviously untenable or manifestly*

groundless as to be utterly hopeless": Attorney- General v Wentworth (1988) 14 NSWLR 481 at 491 per Roden J, or if the proceedings have "no reasonable prospect at all of success": Abrahams v Comcare [2006] FCA 1829; (2006) 93 ALD 147 at [24], per Madgwick J.

(c) The power of the Tribunal to dismiss proceedings under s 42B is a power that should be used cautiously. Unless the Tribunal is satisfied that the application is frivolous or vexatious in the sense referred to in subparagraphs (a) and (b) above, an applicant should not be denied the right to have the Tribunal review the decision in issue on the merits, by conducting a hearing de novo and considering the evidence that the applicant can properly adduce at that hearing: General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125 at 129-130.

(d) However, if proceedings have no reasonable prospect at all of success, they should be dismissed under s 42B, since it would be futile for the proceedings to continue, and inappropriate to use the time and resources of this tribunal, and to put the respondent to the expense that would be involved in the matter proceeding to a hearing.

(e) Conversely, applications to dismiss under s 42B should not be made except in appropriate cases, since otherwise the parties will be put to additional expense, the tribunal's time and resources will be wasted, and the tribunal's ability to provide a mechanism of review that is fair, just, economical, informal and quick (as required by s 2A of the AAT Act) will be impeded.

…

36. A decision to dismiss proceedings as frivolous, vexatious, misconceived, lacking in substance or as having no reasonable prospect of success, necessarily involves a consideration of the merits, in the sense that it requires a finding that the application cannot succeed: *Duncan v Fayle* (2004) 138 FCR 510 at [22]; *Theo v Secretary, Department of Family and Community Services* (2006) 32 AAR 503; [2006] FCA 279; *Paraponiaris and Secretary, Department of Employment* [2015] AATA 895 (***Paraponiaris***) at [24].

37. In *Munnings v Australian Government Solicitor [No 2]* (1994) 118 ALR 385; 68 ALJR 169, the High Court stated at [171] that where any "real question" of fact or law emerges upon which the rights of the parties depend, then that question must be determined and:

> *…it is not possible to stay the action as frivolous or vexatious.*

38. In this case, there is no dispute as to the facts. Rather, the dismissal application only concerns a question of law, namely the application of s 31 of the IR&D Act. As DP Alpins said in *Paraponiaris* (at [28]):

> *...where the success of an application for review depends upon propositions of law said to arise from relevant legislative provisions which are not sufficiently tenable as a matter of proper statutory interpretation, in my opinion it is open to the Tribunal to be satisfied that the application has no reasonable prospect of success for the purposes of s 42B(1)(b).*

39. The concept of whether an application has "no reasonable prospect of success" extends to whether, as a matter of substance, the review by the Tribunal will have any utility or useful outcome. The Federal Court and Tribunal have found on a number of occasions that if an application cannot serve a purpose for an applicant, it should not continue. For example, in *Williams*, Mathews, Hill and Beaumont JJ said (at [373]):

> *Whatever the outcome of this case, were it to proceed to a final hearing, it could have no effect whatsoever upon the one matter which appears to concern the applicant, namely the validity of the structural changes effected by the Greens in August 1992. Nor could it have any effect upon any other matter which is of interest to the applicant. Indeed it could have no effect upon anything... the continuance of the proceedings would indeed be futile.*

40. Similarly, in *Williams*, in dismissing the application pursuant to s 42B, the Tribunal drew a connection between a lack of practical effect and the standing of the applicant, as follows (at [374]):

> *In this case the outcome of the proceedings, whether successful to the applicant or otherwise will be devoid of any practical effect... The interest which gave the applicant standing to commence the proceedings has long since ceased to exist He has no legitimate interest in pursuing them further. Accordingly, in our opinion, while the proceedings were not instituted vexatiously, they have become vexatious... It would impose unnecessary expense and hardship upon the respondent and the Greens if the case were to proceed further.*

41. The cost that a respondent will incur in defending a claim which lacks a practical outcome is also a relevant consideration. In *Irving and Reparation Commission* (1997) 46 ALD 20, the Tribunal considered whether an applicant who already received a social security age pension qualified for a service pension. The respondent submitted that the remuneration for the social security age pension was the same as that for the service pension, with the applicant conceding that he did not stand to make a financial gain but sought to pursue the matter for personal honour. The Tribunal concluded (at [22]) that:

> *...a successful application would have no practical effect as the applicant would not receive any monetary benefit, but rather would potentially face greater legal costs. Added to this is the expense that would be incurred by the respondent in the proceedings... the Tribunal is satisfied that the application is frivolous and vexatious and were it not for the applicant being precluded from continuing with the application due to the doctrine of res judicata, the tribunal would dismiss the*

application pursuant to s 42B of the Administrative Appeals Tribunal Act 1975 (Cth).

42. In *Re Canberra Raiders Sports Club and Commissioner for ACT Revenue* (1999) 59 ALD 229, the applicant sought review of a decision refusing it a gaming machine licence in respect of licensed premises. One of the reasons for this decision was that the *Casino Control Act 1988* (ACT) prohibited the installation and use of gaming machines in the casino. The Tribunal held at [229] that:

> *The Administrative Appeals Tribunal (the tribunal) must exercise great caution before terminating an action. However, in this case, even if the application were successful, it could achieve no practical benefit for the applicant as the Casino Control Act would prevent gaming machines being installed in the relevant premises.*

43. The Tribunal further observed at [231] that:

> *Any decision of the tribunal in this case to approve the grant of a licence would be of no practical effect for an indeterminate period of time or even potentially at all. The hearing of this case would be futile and involve an unnecessary utilisation of resources.*

The IR&D Act

44. Pursuant to s 28A of Division 3 of Part III of the IR&D Act, titled "Other findings", an "R&D entity" can seek an advance finding about whether an activity is an "R&D activity". Section 4 of the IR&D Act provides that "R&D entity" and "R&D activities" have the same meaning as in the ITAA 1997. An advance finding binds the Commissioner of Taxation for the purpose of working out R&D tax offsets under Division 355 of the ITAA 1997. Section 28A(1) of the IR&D Act relevantly provides:

> ***28A Advance findings about the nature of activities***
>
> *(1) The Board must, on application by an R&D entity for a finding under this subsection about an activity, do one or more of the following:*
>
> *(a) find that all or part of the activity is a core R&D activity;*
>
> *(b) find that all or part of the activity is a supporting R&D activity in relation to one or more specified core R&D activities for which the entity has been or could be registered under section 27A for an income year;*
>
> *(c) make a finding to the effect that all or part of the activity is neither:*
>
> *(i) a core R&D activity; nor*

(ii) a supporting R&D activity of a kind covered by paragraph (b);

(d) if justified in accordance with the decision-making principles--refuse to make a finding about all or part of the activity.

45. Section 28B(1) of the IR&D Act provides:

> ***28B Applications made on behalf of R&D entities***
>
> *(1) An application for a finding under subsection 28A(1) may be made on behalf of an R&D entity by an entity who:*
>
> *(a) is specified in regulations made for the purposes of this subsection; and*
>
> *(b) is acting with the R&D entity's written consent.*
>
> *The application is taken to be made by the R&D entity.*

46. Pursuant to s 28C of Division 3 of Part III of the IR&D Act, an R&D entity can seek a finding about activities to be conducted outside Australia. Section 28C(1) of the IR&D Act provides:

> ***28C Findings about activities to be conducted outside Australia***
>
> *(1) The Board must, on application by an R&D entity for a finding under this subsection about an activity, do one or more of the following:*
>
> *(a) find that all or part of the activity is an activity (the **overseas activity**) that **meets the conditions in section 28D**;*
>
> *(b) find that all or part of the activity is not an activity that **meets the conditions in section 28D**;*
>
> *(c) if justified in accordance with the decision-making principles--refuse to make a finding about all or part of the activity.*
>
> (emphasis added)

47. Section 28D of the IR&D Act provides:

> ***28D Conditions for a finding that an overseas activity cannot be conducted in Australia etc.***
>
> ***Must be an R&D activity***
>
> *(1) The **first condition** is that the overseas activity is covered by a finding under paragraph 28A(1)(a) or (b) (findings that activities are R&D activities).*
>
> ***Must have significant scientific link to Australian core activities***
>
> *(2) The **second condition** is that the overseas activity has a significant scientific link to one or more core R&D activities (the **Australian core activities**):*

(a) that are conducted or to be conducted solely within Australia; and

(b) that:

(i) are registered under section 27A for the R&D entity for an income year; or

(ii) are reasonably likely to be conducted and be registered under section 27A for the R&D entity for an income year.

*(3) The overseas activity has a **significant scientific link** to the Australian core activities if:*

(a) the Australian core activities cannot be completed without the overseas activity being conducted; and

(b) the conditions (if any) specified in regulations made for the purposes of this subsection are met.

Must be unable to be conducted within Australia etc.

*(4) The **third condition** is that the overseas activity cannot be conducted solely in Australia because:*

(a) conducting it requires access to a facility, expertise or equipment not available in Australia; or

(b) conducting it in Australia would contravene the Biosecurity Act 2015 or a law relating to quarantine; or

(c) conducting it requires access to a population (of living things) not available in Australia; or

(d) conducting it requires access to a geographical or geological feature not available in Australia; or

(e) it meets a condition (if any) specified in regulations made for the purposes of this subsection.

Expenditure must be less than that incurred on Australian core activities

*(5) The **fourth condition** is that the total actual and reasonably anticipated expenditure of any entity in all income years on:*

(a) the overseas activity; and

(b) each other activity (if any) conducted wholly or partly outside Australia that has a significant scientific link to the Australian core activities;

is less than the total actual and reasonably anticipated expenditure of any entity in all income years on:

(c) the Australian core activities; and

(d) activities conducted solely within Australia that are supporting R&D activities in relation to the Australian core activities.

(emphasis added)

48. Division 6 of Part III of the IR&D Act, titled "Consolidated groups and MEC groups", contains the following three sections:

- Section 31, titled "Registrations and findings not effective for subsidiary members for group R&D activities";
- Section 31A, titled "What happens to findings if R&D entity joins a group"; and
- Section 31B, titled "What happens to findings if R&D entity leaves a group".

49. Section 31 of the IR&D Act provides:

> ***31 Registrations and findings not effective for subsidiary members for group R&D activities***
>
> *(1) An R&D entity's registration under section 27A for an income year has **no effect** to the extent that the registration is for an activity conducted during a period that the R&D entity is a subsidiary member of a consolidated group or MEC group, of which the head company is an R&D entity.*
>
> *Example: If an activity is conducted by the R&D entity during all of an income year, and part way through the income year the R&D entity becomes a subsidiary member of a consolidated group:*
>
> *(a) the R&D entity can apply to be registered for the activity for the income year, and that registration will be effective in respect of the first part of the income year; and*
>
> *(b) the head company of the group can apply to be registered for the activity for the income year in respect of the second part of the income year.*
>
> *(2) If:*
>
> *(a) a finding is made under this Part on application by an R&D entity that is a subsidiary member of a consolidated group or MEC group; and*
>
> *(b) the head company of the group is also an R&D entity;*
>
> *the finding has **no effect** to the extent that the finding is for an activity conducted during a period that the R&D entity is a subsidiary member of the group.*[1]
>
> (emphasis added)

[1] Section 4 of the IR&D Act provides that the terms "consolidated group" and "MEC group" have the same meaning in the IR&D Act as they have in the ITAA 1997. The "Dictionary definitions" in s 995-1 of the ITAA 1997 provide that "consolidated group" has the same meaning given by s 703-5 of the ITAA 1997 and that "MEC group" has the meaning given by s 719-5 of the ITAA 1997. It is common ground that, at all relevant times, DZXP, KRQD and QJJS were wholly-owned subsidiary members of MEC groups.

50. Section 31 of the IR&D Act operates to render ineffective the registration of an R&D entity, pursuant to s 27A of the IR&D Act, and any findings made, in this case, under Division 3 of Part III of the IR&D Act, on an application by an R&D entity, if:

- in the case of registration, it is for an activity conducted during a period that the R&D entity is a subsidiary member of a consolidated group or MEC group, of which the head company is an R&D entity: s 31(1) of the IR&D Act; and

- in the case of a finding, the finding is for an activity conducted during a period that the applicant R&D entity is a subsidiary member of a consolidated group or MEC group, and the head company of the group is also an R&D entity: s 31(2) of the IR&D Act.

51. As submitted by Innovation Australia, the language of s 31(2) of the IR&D Act is significant in that a finding (made under Part Ill on an application by an R&D entity that is a subsidiary) has "no effect" to the extent that the finding is for an activity conducted during a period that the R&D entity is a subsidiary member of the group. That is, notwithstanding findings have been made, they are of no effect for either the subsidiary or for the head entity of the MEC group concerned in circumstances where the head entity did not make the application for the findings.

52. This construction is supported by the statutory context and, specifically, by the other two provisions in Division 6 of Part III of the IR&D Act, being s 31A and s 31B of the IR&D Act. Those sections provide:

> ***s 31A What happens to findings if R&D entity joins a group***
>
> *(1) If a finding (the **actual finding**) under this Part:*
>
> *(a) is in force for an R&D entity immediately before the time (the **joining time**) it becomes a subsidiary member of a consolidated group or MEC group, of which the head company is an R&D entity; and*
>
> *(b) is for an activity to be conducted wholly or partly after the joining time;*
>
> *a corresponding finding (the **deemed finding)** in the same terms is taken to come into force at the joining time for the head company and the activity.*
>
> *(2) The deemed finding ceases to be in force if the R&D entity ceases to be a subsidiary member of the group.*
>
> *(3) The result of any review (see Division 5) of an actual finding is taken to apply in a corresponding way to the deemed finding.*

(4) Neither section 28F (notice of decision about findings) nor Division 5 (review) applies to the deemed finding.

s 31B What happens to findings if R&D entity leaves a group

(1) The consequences in subsection (2) apply if a finding (the group finding) under this Part:

(a) is for an R&D entity that is the head company of a consolidated group or MEC group; and

*(b) is in force immediately before the time (the **leaving time**) another R&D entity ceases to be a subsidiary member of the group; and*

(c) is for an activity to be conducted by or for the other R&D entity wholly or partly after the leaving time; and

(d) is not a deemed finding.

(2) The consequences are as follows:

*(a) a corresponding finding (the **continuing finding**) in the same terms is taken to come into force at the leaving time for the other R&D entity and the activity;*

(b) everything that happened under this Part before the leaving time in relation to the group finding is taken to have happened in relation to the continuing finding;

(c) the group finding ceases to be in force at the leaving time.

53. Sections 31A and 31B make provision for where there is the change in the status of an entity. Section 31A deals with where a subsidiary R&D entity becomes a member of a consolidated or MEC group and s 31B deals with when a subsidiary R&D entity leaves a consolidated or MEC group. Broadly, s 31A(1) provides that where a R&D subsidiary entity has some findings in force, and it joins a consolidated or MEC group, the head entity is deemed to have a corresponding finding (i.e. the head entity gets the benefit of the joining subsidiary's finding). Under s 31A(2), the deemed finding will cease to be in force if the R&D entity ceases to be a subsidiary member of the group. Broadly, s 31B(1) provides that where there is a R&D entity that is a head entity, and there is a finding in force immediately before a subsidiary R&D entity leaves a consolidated or MEC group, the subsidiary R&D entity is deemed to take the benefit of the head entity's finding with it when it leaves the group.

54. As contended by Innovation Australia, the text and structure of s 31, and the other two provisions in Division 6 of Part III of the IR&D Act (i.e. s 31A and s 31B of the IR&D Act), indicate that only one company in a consolidated group or MEC group should obtain the

benefit of the R&D tax offsets at any given time, and that it should be the "head entity" (provided that the head entity is also a "R&D entity") that applies for and obtains the relevant findings in relation to the particular "R&D activities".

55. This construction is, in the Tribunal's view, supported by the relevant extrinsic materials.

56. Division 6 of Part III was inserted into the IR&D Act as part of the significant amendments made to the R&D scheme pursuant to the *Tax Laws Amendment (Research and Development) Act 2011*. Pursuant to that Act, amendments were made to both the R&D provisions in the ITAA 1997 and the IR&D Act, to implement the shift from the "R&D Tax Concession Scheme" to the "R&D Tax Incentive Scheme".

57. The Explanatory Memorandum (**EM**) to the *Tax Laws Amendment (Research and Development) Bill 2010* (**Bill**) confirms the aim of the provision in Division 6 of Part III. Although the Bill expanded the entities that were eligible to obtain the R&D tax offset, for a consolidated or MEC group, the proponents of the Bill intended that any purported registration by a subsidiary member would be of "no effect". Relevantly, the EM provides:

> ***Entities ineligible for R&D tax offsets***
>
> *…*
>
> *3.25 For a consolidated or multiple entry consolidated group (MEC group), any purported registration by a subsidiary member is of no effect (see detailed explanation in Chapter 5). Even without this rule, in a consolidated or MEC group the head entity (and not a subsidiary) would get the R&D tax offset.*

58. The EM further provides:

> ***Consolidated groups***
>
> *3.190 Under Part 3-90 of the ITAA 1997 subsidiary members of a consolidated group or MEC group are treated as part of the head company of the group for income tax purposes.*
>
> *3.191 Therefore, as is the case under the existing law, Division 355 will apply to a consolidated group or MEC group as if it were a single entity. This means that, for example:*
>
> - *expenditure incurred by the subsidiary on R&D activities is taken to be incurred by the head company;*
> - *R&D activities conducted for the subsidiary by a third party are taken to have been conducted for the head company; and*
> - *R&D activities conducted by one member of the group for another member of the same group are taken to have been conducted by the head company on its own behalf.*

3.192 If an entity joins a consolidated group or MEC group part way through an income year, the joining entity must work out the amount of income tax payable on its taxable Income for the period before the joining time as if it were an income year (section 701-30). The joining entity will be entitled to R&D tax offsets that relate to R&D activities undertaken before the joining time provided that it is a registered R&D entity for the income year.

3.193 The head company of the group will be entitled to R&D tax offsets that relate to R&D activities undertaken after the joining time provided that it is a registered R&D entity for the income year.

59. Significantly, for present purposes, the EM states:

3.194 The head company of the group must be a registered R&D entity for the income year as the joining entity's status as a registered R&D entity is not imputed to the head company. In this regard, ***any purported registration by a subsidiary member of a consolidated group or MEC group is of no effect (subsection 31(1) of the IR&D Act). Similarly, any finding under Part III of the IR&D Act (about registrations etc.) on application by an entity is of no effect to the extent that the finding is for an activity conducted when the entity was a subsidiary member of a consolidated group or MEC group (subsection 31(2) of the IR&D Act)****. For a detailed explanation, see Chapter 5.*

(emphasis added)

60. Additionally, Chapter 5 of the EM provides:

Research and development entities joining and leaving consolidated groups

5.159 For administrative simplicity, it is intended that only the head company of a consolidated or MEC group will be considered to be the R&D entity with respect to R&D activities conducted by any entities in the group for an income year. To facilitate this, only that head company, and not any of the subsidiary companies, will be recognised as registered under section 27A in respect of activities conducted by any member of the group. This is the case even if the activities are conducted entirely by a subsidiary member of the group. [Schedule 2, item 1, subsection 31 (1)].

5.160 In addition, a finding, made for an R&D entity which is a subsidiary of a consolidated or MEC group with a head company which is an R&D entity, has no effect in relation to activities conducted while the subsidiary is a member of the group. [Schedule 2, item 1, subsection 31(2)]

5.161 Because of these two rules, ***there is no value in an R&D entity which is a subsidiary of a consolidated or MEC group seeking registration or findings while it is a subsidiary of a consolidated or MEC group****.*

5.162 When an R&D entity (the joining entity) joins a consolidated or MEC group part way through an income year, it can be registered in respect of the R&D activities that it has carried out only in relation to that part of the year that it was not part of the corporate group. The head company will need to register in respect of the activities for the part of the year that they were conducted by an entity in its group.

5.163 Additionally, findings which related to the joining entity are deemed to apply to the head company. For example, if the Board has made an advance finding (the actual finding) in relation to an activity to be conducted by the joining entity, a corresponding advance finding (the deemed finding) will apply to the head company from the time the joining entity joins the consolidated group. That deemed finding would cease to apply to the head company if the joining entity leaves the group. [Schedule 2, item 1, section 31A]

(emphasis added)

61. As submitted by Innovation Australia, the emphasised passage (above) indicates that whilst there is nothing expressly in the terms of Part III of the IR&D Act to preclude a subsidiary company from registering, or from submitting an application for an advance/overseas finding, there will be no value in it doing so because, apart from the very narrow circumstances expressly provided for in s 31A and s 31B, the registration and/or finding will be of "no effect".

62. Clause 4.2 of the IR&D Principles, which are made pursuant to s 32A of the IR&D Act, confirms that absence of utility by providing that a refusal to make a finding about all or part of an activity or technology for an activity is justified if, relevantly:

4.2(1)(d) …the activity is conducted or technology is used during a period when the R&D entity making the application is a subsidiary member of a consolidated group or MEC group and the head company of the group is also an R&D entity;

63. Further, the "Explanatory Statement" to the IR&D Principles states:

1.51 The Board is justified in refusing to make a finding if the finding would cover a period where the applicant is a subsidiary member of a consolidated group or multiple entry consolidated group (MEC group) of which the head company is an R&D entity. This is to ensure that the applicant in this circumstance is the head company as the head company, not the subsidiary member, will be the appropriate applicant.

Application of s 31 of the IR&D Act

64. As set out above (in paragraph 11), on 20 December 2012, DZXP, KRQD and QJJS applied for the advance/overseas findings for the 2012, 2013 and 2014 income years in

respect of overseas R&D activities related to the Joint Venture. They did this by completing, electronically, the approved AusIndustry form, titled "R&D Tax Incentive Application: Advance/Overseas Finding". The "Introduction" section at the front page of the electronic form provided information to DZXP, KRQD and QJJS which included the following under the bolded heading "Who is eligible to apply for an Advance Finding or Finding on Overseas Activities?":

> *Note: if you are part of a consolidated or multi-entry consolidated (MEC) group, only the head company of the group may apply for an advance or overseas finding.*

65. The application form requires that the applicant for such a finding nominate its "R&D entity type".

66. In their application forms, DZXP and KRQD completed that field of the form by selecting:

> *Individual entity (non-consolidated). (T10, pg768; T12, pg880)*

67. That information was factually inaccurate because, as previously stated, DZXP and KRQD were both members of MEC groups at the time of making their applications. (Exhibit 1, Document 1)

68. In completing its application form (T11, pg 828), QJJS completed that field of the form by selecting:

> *Head company of consolidated or multiple entry consolidated (MEC) group.*

69. That information was factually inaccurate because, as previously stated, QJJS was not the head entity of a MEC group at the time of making its applications but, rather, was the wholly owned subsidiary member of a MEC group.

70. Further, in completing their respective application forms, DZXP, KRQD and QJJS each made a "Declaration" that the information provided in the form was true and correct in material detail. Clearly, it was not. Innovation Australia then relied upon the incorrect information provided by DZXP, KRQD and QJJS, and their "Declarations", in considering their applications and making the Original Findings. (T10; T11; T12)

71. By letter to the Tribunal dated 7 December 2015, DZXP, KRQD and QJJS acknowledged that this information on their application forms was incorrect. That letter states:

> *5. As the Respondent has pointed out, some of the Applicants misidentified themselves on the original application forms as not being members of a consolidated group when in fact they were. This was an administrative mistake, which it is submitted, can have no effect on the true facts. Under the "single entity" rule, their actions relevant to the Income Tax Assessment Acts are taken to be actions of the head entity and in fact their actions were under the direction and control of their respective head entities and for their benefit.*

72. In that same letter, DZXP, KRQD and QJJS also confirmed that:

- DZXP M is an "R&D entity" that is the head company of a MEC group, of which DZXP is a subsidiary member: at [8]-[10];
- KRQD M is an "R&D entity" that is the head company of a consolidated group from 5 April 2011, of which KRQD is a subsidiary member: at [20]-[22]; and
- QJJS M is an "R&D entity" that is the head company of a MEC group, of which QJJS is a subsidiary member: at [25]-[27].

73. As such, DZXP, KRQD and QJJS were not the correct applicants for the relevant applications for advance/overseas findings. According to Innovation Australia, the consequence of this is that any findings by the Tribunal, on review, will, pursuant to s 31(2) of the IR&D Act, have "no effect". The Tribunal agrees with this contention.

74. DZXP, KRQD and QJJS accept that s 31 of the IR&D Act should be read in accordance with its terms, so as to preclude registration on the part of a subsidiary of consolidated tax group or MEC entity under s 27A having any effect. In this regard, the Applicants' Submissions state:

> *6.1. We agree with the Respondent's argument identified at 4.1 above that, the text and structure of section 31 and sections 31A and 31B of the IR&D Act indicate that only one company in a tax consolidated group or MEC group should obtain the benefit of the R&D tax offsets, and that company should be the head company (provided the head company is also the R&D entity);*

75. However, as contended by Innovation Australia, in seeking to avoid that consequence, DZXP, KRQD and QJJS contend that s 31 does not operate in a situation involving "administrative error", whereby subsidiary members of an MEC group are named in the applications instead of the head entities of the MEC group, in circumstances where:

(i) each of the head companies concerned:

(a) caused DZXP, KRQD and QJJS to make the initial applications, the applications for internal review and the applications to the Tribunal; and

(b) intended that the findings would affect their respective income tax positions; and

(ii) Innovation Australia did not pick up the error.

76. In this regard, the Applicants' Submissions state:

> *6.3. The Incorrect Names do not, by virtue of the operation of section 31 of the IR&D Act or any other section, render the Findings to have no effect. Rather, the consequence of the Incorrect Names is that the Findings apply only for the benefit of the Head Companies, being the entities entitled to the benefit of the R&D tax offsets in dispute.*
>
> *…*
>
> *6.11. The Applicants were misnamed in the applications for Advance/Overseas Findings as a result of an administrative error. The application forms for Advance/Overseas findings are not legislative instruments and are purely administrative in nature. Section 31 of the IR&D Act is intended to assist in the administration of the IR&D Act to be consistent with the single entity rule; it is not intended to render ineffective registrations under section 27A or findings under Part III of the IR&D Act purely because of an administrative error which misnames the R&D entity for the purposes of the registration and/or finding (as the case may be).*

77. As submitted by Innovation Australia, the Tribunal finds that the first of the above matters, which is repeated, with some variation on a number of occasions in the Applicants' Submissions (at [9], [12]-[13], [31] and [61]), rises no higher than the level of assertion. As contended by Innovation Australia, there is nothing in the relevant advance/overseas findings application forms to suggest that they were submitted by DZXP, KRQD and QJJS, respectively, "on behalf of" any other party, nor is there any evidence before the Tribunal that would support an express or implied agency arrangement.

78. Additionally, as set out above (in paragraph 45), s 28B of the IR&D Act specifically provides that, an application for a finding under s 28A(1) can be made "on behalf of" an R&D entity, namely by an entity who is specified in the regulations and is acting with the R&D entity's written consent. However, that is not what occurred in this case.

79. Further, as submitted by Innovation Australia, the Tribunal finds that the second of the above matters seeks, wrongly, to hold Innovation Australia responsible for the alleged error. The Applicants' Submissions state:

> *17. Accordingly, it is the Respondent's error in issuing the Findings in the name of the subsidiary members which results in the application of section 31, and denies the Head Companies the benefit of the R&D Tax Incentive Scheme.*

80. Even if there were error on the part of Innovation Australia, the Tribunal considers (as submitted by Innovation Australia) that Innovation Australia would not be obliged to assist a party to nominate the correct applicant on an application form, nor is it required to reject an application from an incorrect entity.

81. More fundamentally, however, as asserted by Innovation Australia, DZXP, KRQD and QJJS do not advance any convincing basis, grounded in the text of s 31 or the surrounding legislative context, as to why s 31 does not operate, to render a finding in relation to a subsidiary entity ineffective, merely because the application made by the entity was the product of alleged administrative error. As argued by Innovation Australia, s 31 does not place any qualification on the operation of the section, by reference to administrative error or otherwise.

82. The Applicants' Submissions state (at [19]):

> *The basis for the Respondent's case that these proceedings before the Tribunal be dismissed relies entirely upon the fact that the relevant application forms misidentified the R&D entity. The Respondent, in turn, relies upon section 31 of the IR&D Act so that the Findings are of no effect. However, what the Respondent is asking the Tribunal to accept is the proposition that an administrative error made by the Applicants, not disputed by the Respondent for a period of more than 3 years and perpetuated by the Respondent in the Findings is grounds for the dismissal of these proceedings. The Respondent's proposition is neither contemplated by the words of section 31 nor consistent with the Explanatory Memorandum to the Tax Laws Amendment (Research and Development Bill) 2010 (**"R&D Bill EM"**).*

83. Contrary to the contention of DZXP, KRQD and QJJS at [19] of the Applicants' Submissions, Innovation Australia's dismissal application does not rely, "entirely" or otherwise, upon the fact that the forms were filled in "incorrectly". Its focus is, as it must be, upon the terms of s 31, in circumstances where the forms were filled in by DZXP, KRQD and QJJS, being subsidiary members of MEC groups.

The "single entity rule"

84. DZXP, KRQD and QJJS seek to derive some support for their position from the "single entity rule" as set out in s 701-1 of Division 701 of Part 3-90 of the ITAA 1997. Broadly, under the "single entity rule", in s 701-1 of the ITAA 1997, where a group of corporate tax entities is a consolidated group (which is established by the head entity making an irrevocable choice to consolidate with all of its wholly-owned subsidiary entities), the group is treated as a single taxpayer for income tax purposes during the period of consolidation.

85. Relevantly, the Applicants' Submissions state:

> ***Single entity rule***
>
> *7. One of the stated objectives of the income tax consolidation regime and the single entity rule as set out in the Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No.1) 2002 ("Consolidation Bill EM") is to "simplify the tax system and reduce ongoing compliance costs" for both the taxpayer and the Australian government, and "to promote economic efficiency by providing a taxation framework that allows Australian businesses to adopt organisational structures based more on commercial rather than tax considerations".*
>
> *8. For the purposes of working out the liability to tax under the Australian income tax legislation, the single entity rule contained in Part 3-90 of the ITAA 1997 operates to treat a subsidiary member of a consolidated group to be part of the head company of the group, rather than separate entities during the period the subsidiary remains a member of the consolidated group. Therefore, the fundamental consequences of a choice made by a group of eligible wholly-owned entities to consolidate are that on entry into a consolidated group:*
>
> *8.1. the head entity of a tax consolidated or MEC group bears liability for income tax on the taxable income of the entire group;*
>
> *8.2. accordingly, the subsidiary entities lose their individual income tax identity for the duration they remain part of the tax consolidated or MEC group; and*
>
> *8.3. the actions of the subsidiary members are treated as if they had been undertaken by the head company.*
>
> *9. Each of the Head Companies of the relevant MEC group caused the applications for Advance/Overseas Findings to be made pursuant to sections 28A and 28C of the IR&D Act (along with the subsequent requests for internal review) and intended that the result of the applications would affect their taxation positions in accordance with the single entity rule.*
>
> *10. The Applicants were all subsidiary members of MEC groups of which the respective head entities were the Head Companies. In those circumstances, by reason of section 31 of the IR&D Act (and the Consolidations regime in Part 3-90 of the ITAA 1997), the person who is affected by any findings made about activities conducted in the*

consolidated group is the head entity of the relevant consolidated group, not the subsidiary member.

(footnotes omitted)

86. The "single entity rule" was introduced in 2002 so as to allow head companies and wholly-owned entities to elect to be taxed as a single entity. Sections 28A, 28C and 31 were inserted into the IR&D Act in 2011. The passages in the EM, set out in paragraphs 57 to 60 above, indicate that the legislature was cognisant of the relationship between these provisions and the single entity provisions of the ITAA 1997. In those circumstances, express provision could have been made by the legislature for s 31 of the IR&D Act to operate in a manner that accommodated situations such as DZXP, KRQD and QJJS assert occurred in the present case, but, tellingly, it was not.

87. Further, DZXP, KRQD and QJJS seek to rely on the decision of the majority of the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) in support of their position. Specifically, the Applicants' Submissions state:

> *32. The correct interpretive approach in circumstances where there appears to be a conflict between legislative provisions is considered in Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28 at [70]:*
>
> > *"A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."*
>
> *33. This passage emphasises the importance of the context, purpose and policy of a provision and its consistency and fairness as guides to its meaning (refer Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation [2015] FCAFC 57 at [5]).*
>
> *34. Consequently, section 31 of the IR&D Act should be read to in a manner which achieves harmony between its operation and the objectives of the Consolidations regime.*

88. As submitted by Innovation Australia, that s 31 of the IR&D Act was not drafted in that manner, 9 years after the "single entity rule" was introduced in Part 3-90 of the ITAA 1997, so as to permit any qualifications on its operation, represents a legislative choice that no exceptions be made. In so far as the DZXP, KRQD and QJJS rely on *Project Blue Sky*, the Tribunal considers that its construction of s 31 of the IR&D Act, as set out above, is consistent with the text of the provision, read in context: refer to paragraphs 44 to 56 above.

89. The Tribunal considers its construction of Division 6 of Part III of the IR&D Act is entirely consistent with the consolidation regime in Part 3-90 of the ITAA 1997. Indeed, the provisions operate in tandem – they dovetail together neatly. Section 31 of the IR&D Act reflects or, put differently, is married to the "single entity" rule in s 701-1 of the ITAA 1997. Section 31A of the IR&D Act reflects, or is married to, the "entry history rule" in s 701-5 of the ITAA 1997 and s 31B of the IR&D Act reflects, or is married to, the "exit history rule" in s 701-40 of the ITAA 1997. More specifically, s 31 of the IR&D Act reflects the "single entity" rule in the ITAA 1997 and seeks to ensure that the right entity, being the "head entity" of a consolidated or MEC group, makes the application for findings. That is, there is no value in an R&D entity which is a subsidiary member of a consolidated or MEC group seeking registration or findings. What s 31 of the IR&D Act is effectively saying is that if a subsidiary member of a consolidated or MEC group applies to Innovation Australia for findings, the findings will have "no effect" because the relevant entity under the "single entity" rule is the "head entity" of the consolidated or MEC group and it is the "head entity" that should make the application.

90. DZXP, KRQD and QJJS submit that Innovation Australia's construction of s 31 of the IR&D Act would have an unintended effect, by precluding a head entity from accessing tax benefits to which it would otherwise be entitled. Relevantly, the Applicants' Submissions state:

> *6.3. The Incorrect Names do not, by virtue of the operation of section 31 of the IR&D Act or any other section, render the Findings to have no effect. Rather, the consequence of the Incorrect Names is that the Findings apply only for the benefit of the Head Companies, being the entities entitled to the benefit of the R&D tax offsets in dispute.*
>
> *…*
>
> *6.6. The overriding objective of the statutory regime embodied in the IR&D Act as set out in section 3 is, "to promote the development, and improve the efficiency and international competitiveness, of Australian industry by*

encouraging R&D activities and innovation". The Head Companies are entitled to and seek the benefit of this statutory regime.

…

57. Each of the Head Companies have at all relevant times been R&D entities for the purposes of the IR&D Act and the ITAA 1997, an accordingly were entitled to apply for Advance/Overseas Findings under sections 28A and 28C of the IR&D Act at the time the original applications were made.

91. However, as contended by Innovation Australia, DZXP, KRQD and QJJS have not clearly articulated what function s 31 of the IR&D Act would serve if it did not have that effect.

The ITAA 1997

92. To access the R&D tax incentive for the claimed overseas R&D activities, under s 355-205 and s 355-210 of the ITAA 1997, DZXP, KRQD and QJJS must be registered in relation to R&D activities under s 27A of the IR&D Act and the activities must be the subject of a finding under s 28C of the IR&D Act.

93. Section 355-205 of the ITAA 1997 provides:

> ***355-205 When notional deductions for R&D expenditure arise***
>
> *(1) An *R&D entity can deduct for an income year (the present year) expenditure it incurs during that year to the extent that the expenditure:*
>
> *(a) is incurred on one or more *R&D activities:*
>
> *(i) for which the R&D entity is registered under section 27A of the Industry Research and Development Act 1986 for an income year; and*
>
> *(ii)* ***that are activities to which section 355-210 (conditions for R&D activities) applies****; and*
>
> *(b) if the expenditure is incurred to the R&D entity's *associate—is paid to that associate during the present year.*
>
> (emphasis added)

94. As stated above (in paragraph 9), the "head entity" of the DZXP MEC group has registered under s 27A of the IR&D Act in respect of the income year ended 30 June 2013, but it has not registered under s 27A in respect of the income years ended 30 June 2014 and 30 June 2015. It has, however, lodged applications for late registration, which Innovation Australia will consider under the IR&D Act and the IR&D Principles. However, at this stage an essential requirement under s 355- 205 of the ITAA 1997 has not been met for the head company of the DZXP MEC group of which DZXP is a subsidiary.

95. As stated above (in paragraph 10), the "head entities" of the KRQD MEC group and the QJJS MEC group are registered under s 27A of the IR&D Act for the income years ended 30 June 2013, 30 June 2014 and 30 June 2015.

96. As part of the statutory requirements in s 355-205 of the ITAA 1997, s 355-210 must be satisfied. Section 355-210 of the ITAA 1997 relevantly provides:

> ***355-210 Conditions for R&D activities***
>
> *(1) An *R&D activity covered by one or more of the following paragraphs is an activity to which this section applies:*
>
> *(a) …*
>
> *…*
>
> *(d) the R&D activity is:*
>
> *(i) conducted for the R&D entity solely outside Australia and the external Territories; and*
>
> *(ii) covered by a finding in force under paragraph 28C(1)(a) of the Industry Research and Development Act 1986;*
>
> *(e) the R&D activity consists of several parts, with:*
>
> *(i) some parts being conducted for the R&D entity solely within Australia or an external Territory; and*
>
> *(ii) the other parts being conducted for the R&D entity outside Australia and the external Territories while covered by a finding in force under paragraph 28C(1)(a) of the Industry Research and Development Act 1986.*

97. For the above reasons, the findings that have been made by Innovation Australia in respect of DZXP, KRQD and QJJS have "no effect" under s 31 of the IR&D Act. Accordingly, DZXP, KRQD and QJJS cannot satisfy the second statutory requirement in s 355-205(1)(a)(ii) of the ITAA 1997.

98. Nor can any of the head companies of the DZXP, KRQD and QJJS MEC groups. As submitted by Innovation Australia, the difficulty for them is, under s 355-205(1)(a) and s 355-210(1)(d) and (e) of the ITAA 1997, an R&D entity has to be both registered and have a finding in force under s 28C of the IR&D Act in order to be eligible for a tax offset for overseas activities. As submitted by Innovation Australia, a finding cannot now be made under s 28C of the IR&D Act in relation to the past income years on the application of the head companies of the DZXP, KRQD and QJJS MEC groups.

99. Further, as contended by Innovation Australia, by reason of the operation of s 31 of the IR&D Act, the nature of the findings in s 28C of the IR&D Act as "advance" findings, and the operation of s 355-205 of the ITAA 1997, a review of the Deemed Decisions by the Tribunal cannot result in a situation where of the DZXP, KRQD and QJJS, or their head companies, can obtain the benefit of the relevant R&D Tax incentive. Accordingly, the applications are misconceived or, alternatively, have no reasonable prospect of success. Whilst the Tribunal is cognisant of the fact that the s 42B dismissal power is one which should be exercised cautiously and sparingly (refer to paragraph 33 above), it considers it appropriate that the power be exercised in this case.

100. Section 2A of the AAT Act provides:

> ***2A Tribunal's objective***
>
> *In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:*
>
> *…*
>
> *(b) is fair, just, economical, informal and quick; …*

101. The dismissal of these applications is, in the Tribunals' view, consistent with the Tribunal's statutory objective in s 2A of the AAT Act, as set out above. To permit DZXP, KRQD and QJJS to direct further efforts towards gathering and presenting additional material for a hearing, and to require Innovation Australia and, indeed, the Tribunal to allocate additional resources to these proceedings, would be contrary to the Tribunal's statutory objective: refer to the case law discussed in paragraphs 35 to 43 above.

Sections 28C and 28G of the IR&D Act

102. The Applicants' Submissions state the following in relation to s 28C of the IR&D Act:

> *58. Subsection 28C(2) provides that a finding under section 28C comes into effect in the year in which the application is made. Accordingly, an application for a finding made after the end of a year of income will not have any effect in respect of an income year prior to the year in which the application is made. There is no express power in the IR&D Act which enables an applicant to obtain an extension of time to make an application for a finding under section 28C of the IR&D Act. Accordingly, each of the Head Companies are now prevented from applying for fresh findings under section 28C of the IR&D Act in respect of each of the years in question (i.e. the 2011-12, 2012-13 and 2013-14 years).*
>
> *59. However, the IR&D Act is silent in relation to the ability to amend an application for a finding under section 28C which has been submitted in a*

particular income year. As stated in paragraph 5.169 of the R&D Bill EM, forms approved by the Board in respect of applications for findings are administrative only. Importantly, there is no express provision which prevents an application for a finding being amended by an applicant or the Respondent, or by reason of section 43(1) of the AAT Act, the Tribunal itself.

60. It appears that if one existed, an express power to amend an application for a finding under section 28C would be found in Subdivision E of Division 3 in Part III of the IR&D Act, which sets out matters relevant to findings made under Division 3, which includes section 28A and section 28C. It is likely that an express power to vary or amend an application was considered unnecessary given that any such amendment would be administrative in nature. The Board's power to correct administrative errors in application forms would fall within its general powers contained in section 8 of the IR&D Act.

61. Each of the Applicants have applied for a finding in the approved form in respect of the income years in which the Applicants seek them to have effect (e.g. the 2011-12 income year). Administrative errors as to the names of the R&D entity (the relevant applicant) were made when the forms were completed. In this regard, for the findings to have effect, each of the application forms should have identified the Head Companies as an applicant instead of the relevant subsidiary member applicant.

62. Accordingly, the Applicants and the Head Companies now seek that the applications for findings under section 28C lodged by the Applicants on 20 December 2012 be amended to include the Head Companies as applicants for findings under section 28C of the IR&D Act.

103. As submitted by Innovation Australia, DZXP, KRQD and QJJS's invocation of s 28C of the IR&D Act to entitle the head entities to findings that apply to income years that have already passed, involves a construction of the provision that is contrary to its terms, and contrary to the otherwise detailed regime in the IR&D Act pursuant to which applications may be amended or varied.

104. The Applicants' Submissions provide the following in relation s 28G if the IR&D Act:

63. Subsection 28G(2) of the IR&D Act provides for joint applications for identical advance findings. An application for joint findings under subsection 28G(2) is clearly appropriate in circumstances where the head entity of a consolidated or MEC group seeks a finding in respect of activities undertaken by a subsidiary member of the group. If, as requested, the applications for Advance/Overseas Findings the subject of these proceedings are amended to add the Head Companies as applicants (in addition to the original subsidiary member applicants), the applications should be treated as separate applications for findings by the Head Companies.

105. Further, as contended by Innovation Australia, the Tribunal finds that s 28G of the IR&D Act does not assist DZXP, KRQD and QJJS. The provision does no more than prescribe how applications are to be made, by one or more entities, and how those applications will be treated. As argued by Innovation Australia, it cannot be relied upon by the Tribunal as conferring a power to characterise an application that was made by a subsidiary entity as one made by the head entity, in circumstances where the head entity did not make the application.

Section 8 of the IR&D Act & "misdescription"

106. Section 8 of the IR&D Act, titled "Powers of the Board", provides:

> *The Board has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.*

107. The Applicants' Submissions state the following in relation to the application of s 8 of the IR&D Act in this case:

> ***The Respondent's general power***
>
> *35. By the operation of section 8 of the IR&D Act, the Respondent may, if it determines it is appropriate, make an administrative amendment to vary the name of an applicant on an application for a finding pursuant to section 28A and/or 28C of the Act.*
>
> *36. In determining whether it is appropriate to exercise the discretion, the Respondent's ability to perform its functions, as prescribed by statute, is a relevant consideration.*
>
> *37. Part III of the IR&D Act is entitled "Functions relating to the R&D tax offset". Section 26 sets out the objects of Part III, which include:*
>
> > *"to provide integrity for the working out of tax offsets under Division 355 . . . of the Income Tax Assessment Act 1997"; and*
> >
> > *"to increase certainty through findings about matters relevant to the working out of those tax offsets."*
>
> *38. It is intended that the Respondent enhances the integrity of the R&D tax offset regime by managing a process of registration for activities (refer paragraph 5.3 of the R&D Bill EM) and by making findings about R&D activities conducted outside Australia in order to enable eligible entities to access an R&D tax offset (refer paragraph 5.4 of the R&D Bill EM).*
>
> *39. By operation of section 8 of the Act, the Respondent has the "power to do all things necessary or convenient to be done for or in connection with the performance of its functions".*
>
> *40. The words contained in section 8 should be interpreted in a manner that would best achieve the objects of the IR&D Act (whether or not those*

objects are expressly stated in the IR&D Act) (refer section 15AA of the Interpretation Act).

41. *The power conferred by section 8 is a general power which facilitates the proper and efficient functioning of the Board of Innovation in carrying out the functions conferred upon it by the IR&D Act.*

42. *Due to its general terms, the scope of the power conferred on the Respondent by section 8 is capable of including the power to correct errors contained in an application for findings under section 28A and 28C of the IR&D Act, if those corrections are necessary or convenient to be done for the effective administration of the Board of Innovation's functions.*

43. *Due to the operation of section 31, if an application is made pursuant to sections 28A and 28C of the IR&D Act, and the application is in the name of a subsidiary member, rather than the head entity, of a consolidated or MEC group, any finding made by the Respondent on that application is of no effect.*

44. *Consequently, if the subsidiary member of the consolidated or MEC group were not to be replaced by the head entity on the application form, the Board of Innovation could not perform its functions under section 26 of the IR&D Act and as contemplated at paragraphs 5.3 and 5.4 of the R&D Bill EM.*

45. *A power conferred on the Respondent to vary the name of the applicant on an application for a finding pursuant to sections 28A and 28C is comparable to the Respondent's powers to vary registrations made under section 27A of the IR&D Act.*

46. *The Respondent may vary an R&D entity's registration made under section 27A at any time the entity applies to make minor amendments to correct information provided in the application for registration (refer principles 5.2 and 5.3 of the Industry Research and Development Decision-making Principles 2011). The Applicants refer to paragraph 38 of the Respondent's written submissions which acknowledges that the Respondent is currently considering such an application by [DZXP M] to register as an R&D entity for the income periods 2013/14 and 2014/15. To date, the Respondent has not provided any indication to either [DZXP M] or … DZXP that those applications will not be varied in favour of [DZXP M] and the Tribunal should proceed on the basis that the correct head entity will be registered accordingly for those income periods.*

47. *The generality of the power conferred on the Respondent by section 8 should not be read so broadly that it would be inconsistent with other specific provisions of the IR&D Act.*

…

53. *A construction of the section 8 power which empowers the Respondent, on the request of an applicant, to amend the name of the applicant on an application for a finding under sections 28A and 28C from a subsidiary member of a consolidated group to the head entity of that group, is consistent with the purpose of the provisions contained in Division 6, including section 31 of the IR&D Act.*

> *54. There is no evident repugnancy between this construction of the section 8 power and the specific provision contained in section 31 of the IR&D Act.*

108. In so far as DZXP, KRQD and QJJS rely on s 8 of the IR&D Act for the proposition that Innovation Australia is able to do all things "necessary and convenient" in the performance of its powers and functions, the Tribunal notes the following:

- an ancillary provision, like s 8 of the IR&D Act, cannot have the consequence of overriding the express words in s 31 of the IR&D Act: *Victims Compensation Fund v Brown* [2003] HCA 54; (2003) 77 ALJR 1797;
- Innovation Australia (i.e. the Board) has the functions and powers set out in the IR&D Act and the "necessary and convenient" power in s 8 operates to supplement those powers to ensure that the Board can operate effectively. However, as submitted by Innovation Australia, s 8 is not a vehicle to introduce new powers or functions which are at odds with the express statutory scheme; and
- s 31 of the IR&D Act does not, as contended by Innovation Australia, involve the exercise of a power. Rather, it operates as a matter of law, and applies to a finding made "on application by an R&D entity…".

109. DZXP, KRQD and QJJS contend that the Tribunal, standing in the shoes of Innovation Australia, has the power, pursuant to s 8 of the IR&D Act, to vary the findings of Innovation Australia so that the findings relate to another entity, namely the head entities of the MEC groups of which DZXP, KRQD and QJJS are subsidiary members. For the reasons below, the Tribunal does not accept this submission.

110. It is fundamental to the Tribunal's jurisdiction that it must be conferred by an enactment, in this case s 30E of the IR&D Act does that. Despite the broad power of the Tribunal to stand in the shoes of the decision-maker (here, Innovation Australia), it must be borne in mind that the power is exercisable only in relation to the decision under review (i.e. the "reviewable decision"). Section 43(1) of the AAT Act states:

> *for the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision…*
>
> (emphasis added)

However, the Tribunal does not substitute for the decision-maker generally, nor does it have a general review or decision-making power. As President Brennan J said in *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at [175]:

> *The Tribunal is not a primary administrator. It is not the original repository of powers and discretions under an enactment.*

111. Consequently, if for some reason (as is the case here), an issue before the Tribunal has not been the subject of a decision of the primary decision-maker, the Tribunal cannot itself assume to make a decision on the matter on the basis that the decision-maker could have or should have made such a decision: *Re Hare and Commissioner for Superannuation* (1979) 2 ALD 233.

112. Section 30 of the IR&D Act provides:

- *An entity affected by a **reviewable decision** may ask the Board to conduct an internal review of that decision.*
- *The entity, or another entity affected by the resulting internal review decision, may ask the Administrative Appeals Tribunal to review the internal review decision.*

(emphasis added)

113. Section 30A of the IR&D Act sets out which decisions are "reviewable decisions". Relevantly, a decision of the Board under s 8 of the IR&D Act is not a "reviewable decision" under s 30A of the IR&D Act. The "reviewable decisions" in this case are the Deemed Decisions: refer to paragraph 16 above. For the above reasons, the Tribunal does not have the power to vary the Deemed Decisions to have them apply to different entities. Relevantly, to the head entities of the DZXP, KRQD and QJJS MEC groups.

114. At the hearing of this dismissal application, counsel for DZXP, KRQD and QJJS argued that the Tribunal has an inherent power to correct what is an error or "misdescription" on the face of a document. Specifically, the Tribunal has an inherent power to replace the names of DZXP, KRQD and QJJS with the names of their respective head entities on their applications for advance/overseas findings to Innovation Australia. Counsel for DZXP, KRQD and QJJS submitted that this is particularly so, having regard to Innovation Australia's expectation that such applications will be made by the head entity of a MEC group (refer to paragraph 54 above) and the description on the application forms of the

activities being undertaken by DZXP, KRQD and QJJS. In support of this submission, counsel for DZXP, KRQD and QJJS relied on the decision of the High Court of Australia in *Bridge Shipping Pty Limited v Grand Shipping SA and Another* (1991) 173 CLR 231 (***Bridge Shipping***).

115. *Bridge Shipping* was a case concerning the proper construction of Rule 36.01 of the Rules of the Supreme Court of Victoria (**Rules**). Rule 36.01 of the Rules relevantly provides:

> *(1) For the purpose of determining the real question in controversy between the parties to any proceeding, or of correcting any defect or error in any proceeding, or of avoiding multiplicity of proceedings, the Court may at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.*
>
> *…*
>
> *(4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.*
>
> *…*

116. As submitted by counsel for Innovation Australia, in *Bridge Shipping* the High Court was specifically concerned with the proper construction of rule 36.01 of the Rules rather than considering some inherent power of the court to make a correction. This is clear from the following passage of the reasons for judgment of McHugh J at [627]:

> *Rule 36.01(4) is a remedial rule and should be given a beneficial interpretation. It is proper to give it the widest interpretation which its language will permit…*
>
> *To give the rule meaning for which Bridge contends does not mean that a person can sue any person and then at some later time substitute another person for the original defendant. The rule imposes three limitations on a person's right to amend…*

117. As such, *Bridge Shipping* is of little assistance to the task that is before the Tribunal in this case and regarding the question of whether, in reviewing decisions under s 43 of the AAT Act, the Tribunal can make any corrections to the names of the R&D entities who applied to Innovation Australia for advance/overseas findings. The powers that the Tribunal may exercise are tied by the terms of s 43(1) of the AAT Act. In this case, the Tribunal is reviewing very particular decisions (i.e. the Deemed Decisions) which have been made in relation to particular entities (i.e. DZXP, KRQD and QJJS). Under s 43(1) of the AAT Act, it can do one of three things – affirm the Deemed Decisions, vary the Deemed Decisions or set-aside and substitute or remit the Deemed Decisions. It would not constitute a "variation" of a decision, as traditionally understood, to change the name of a party or to

change the name of the R&D entity, such that the benefit goes to an entirely different entity to the one that applied for the advance/overseas findings and the one that applied for to the Tribunal for review. The notion of correcting the applications which resulted in the Deemed Decisions being made is not within the Tribunal's statutory power. The Tribunal has no inherent power to correct misdescriptions in the way that a court may.

118. Additionally, counsel for DZXP, KRQD and QJJS seek to gain support for their positions from s 25C of the *Acts Interpretation Act 1901* (**AIA**), which provides:

> ***s 25C Compliance with forms***
>
> *Where an Act prescribes a form, then strict compliance with the form is not required and substantial compliance is sufficient.*

119. According to counsel for DZXP, KRQD and QJJS, once Innovation Australia became aware that DZXP, KRQD and QJJS were subsidiary members of MEC groups and that their applications for advance/overseas findings were being made in respect of activities being conducted within those groups, s 25C of the AIA would assist in the conclusion that that there was substantial compliance with the approved form. Alternatively, counsel for DZXP, KRQD and QJJS submitted that substantial compliance applies *a fortiori.*

120. The Tribunal does not accept either of these submissions. Section 25C of the AIA deals specifically with "prescribed" forms. Here, an application form for advance/overseas findings is not a "prescribed" form it is an "approved" form. That is, the form is approved by the Minister, it is not prescribed by regulation. Further, there is nothing before the Tribunal to support the contention that substantial compliance applies *a fortiori* in this case.

DECISION

121. For the above reasons, the Tribunal dismisses applications 2015/1257, 2015/1258 and 2015/1259 pursuant to s 42B of the AAT Act.

I certify that the preceding 121 (one hundred and twenty one) paragraphs are a true copy of the reasons for the decision herein of Senior Member CR Walsh

.....[Sgd].....

Administrative Assistant

Dated: 19 April 2017

Date of hearing:	**15 March 2017**
Counsel for the Applicant:	**Mr M Robertson QC**
Solicitors for the Applicant:	**Mr M Caplice** **Ernst & Young Law**
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Solicitors for the Respondent:	**Mr L Holcombe** **HWL Ebsworth Lawyers**